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INTRODUCTION

ONCE MORE UNTO THE BREACH: ELEVENTH AMENDMENT SCHOLARSHIP AND THE COURT

*James E. Pfander**

It is the inherited wisdom of the American bar that responsible professional comment and criticism are the principal restraints upon judicial arbitrariness at the highest level and major influences in the continuing development of court-made law. If there is one legal development . . . which would cause the most credulous observer to doubt the truth of this axiom, it is the continued good health of the doctrine of sovereign immunity. . . . [L]earned members of the legal profession have been continuously attacking the roots and branches of that judicially planted growth. . . . But . . . criticism seems to have confirmed the Court in the error of its ways.

—[Professor] Antonin Scalia (1970)¹

* Professor of Law, University of Illinois College of Law. My thanks go to the editors of the *Notre Dame Law Review* for agreeing to take on the editorial challenges of this Symposium issue and to do so with an outlander like myself. The contributions published here include those (by Judge Fletcher and Professors Vázquez, Woolhandler, and Jackson) that were given to the annual meeting of the Federal Courts Section of the Association of American Law Schools in January 2000 and an additional collection of commentaries from a variety of distinguished scholars. For thoughtful comments on a draft of this introductory Essay, I thank Vicki Jackson, Dan Meltzer, and Jay Tidmarsh. For the title, my thanks to William Shakespeare, *The Tragedy of King Henry the Fifth*, act III, scene i (“Once more unto the breach, dear friends.”).

1 Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 867–68 (1970) (citations omitted) (discussing the federal government’s sovereign immunity from suit in its own courts).

I. INTRODUCTION

One has to admire the gumption of the editors of the *Notre Dame Law Review* for their agreement to publish these comments on recent developments in state sovereign immunity. For in the thirty years since then-Professor Antonin Scalia called attention to the Supreme Court's imperviousness to such criticism in a somewhat different context, academic writing has had little obvious influence on the Court's sovereign immunity jurisprudence.² In the decision that remains a decisive turning point in its new law of state sovereign immunity, *Seminole Tribe v. Florida*,³ the Court revealed a measure of its disdain. Speaking through the Chief Justice, the majority belittled the dissent's account of the origins of state sovereign immunity under the Eleventh Amendment as a "theory cobbled together from law review articles."⁴ In the face of such a courtly dismissal, one could forgive the editors and publishers of the offending material if they were to decide simply to change the subject.

Happily, to my way of thinking at least, the editors of the *Review* and the contributors to this Symposium have not abandoned the (somewhat one-sided) conversation. Prepared in connection with the January 2000 meeting of the Federal Courts Section of the Association of American Law Schools (AALS), the contributions to this Sympo-

2 To be sure, it did appear for a moment in the 1980s that some version of the diversity account of the 11th Amendment, perhaps coupled with abrogation, might emerge from the Court. On the diversity explanation of the 11th Amendment, see William A. Fletcher, *A Historical Interpretation of the Eleventh Amendment: A Narrow Construction of an Affirmative Grant of Jurisdiction Rather Than a Prohibition Against Jurisdiction*, 35 STAN. L. REV. 1033 (1983), and John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983). On abrogation, see John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Government and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975). For the impact of such scholarship on a closely divided Court, see *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 261-87 (1985) (Brennan, J., dissenting) (arguing for the adoption of the diversity explanation of the 11th Amendment), and *Welch v. Texas Department of Highways*, 483 U.S. 468, 496 (1987) (Scalia, J., concurring) (expressing a reluctance to reconsider *Hans v. Louisiana*, 134 U.S. 1 (1890), in light of the diversity explanation without further briefing, leaving open the possibility that he might adopt the diversity view in a subsequent case). Ultimately, however, Justice Scalia joined the dissenters in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29 (1989) (rejecting the diversity account of the 11th Amendment, declining to reconsider *Hans*, and rejecting the notion of congressional abrogation of state sovereign immunity other than pursuant to the 14th Amendment), and the Court has steadily marched away from the scholarly consensus ever since. Increasingly, moreover, it appears to me that scholars have begun to march along.

3 517 U.S. 44 (1996).

4 *Seminole Tribe*, 517 U.S. at 68-69.

sium address issues relating to sovereign immunity in general and to the three most recent decisions of the Supreme Court in particular. The decisions, *Alden v. Maine*,⁵ *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,⁶ and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,⁷ arrived on the last day of the 1998 Term. By an identical 5-4 vote in each case, the Court's majority continued to extend its judge-made doctrine of state sovereign immunity and to surprise and confound academic observers.⁸ The willingness of editors and contributors alike to go forward with this Symposium evidences some continuing faith in the possibility that responsible professional comment and criticism may yet, in the words of Antonin Scalia, restrain judicial arbitrariness at the highest level.

I, too, remain hopeful, as I explain in this Introduction to the Symposium. To be sure, one must acknowledge (as I do in Part II of this Introduction) the somewhat pessimistic reality that *Alden* represents a challenge to much of the existing learning in the field. Before *Alden*, one might have argued that Eleventh Amendment law offered some parameters, within which the Court would move as it continued to work out the implications of its decision in *Seminole Tribe*. But *Alden* breaks through those parameters and raises questions as to the ability of prior decisional law to explain or to constrain the Court's expanding conception of state sovereign immunity. Part III begins the task of trying to account for the factors that may underlie the Court's evolving doctrine and to suggest new areas of inquiry. Part IV continues the task of picking up after *Alden* by surveying the important contributions of the participants in this Symposium. In these contributions, I find reason to hope that Eleventh Amendment scholarship may yet explain, even if it fails to broaden, the Court's narrow conception of state suability.

II. *ALDEN* AND THE DEMISE OF THE ELEVENTH AMENDMENT VERITIES

Eleventh Amendment scholarship has tended to regard the problem of enforcing state compliance with federal law as something that, though nettlesome, remained well within the capacity of the well-rep-

5 119 S. Ct. 2240 (1999).

6 119 S. Ct. 2199 (1999).

7 119 S. Ct. 2219 (1999).

8 The three decisions will no doubt occasion a good deal of comment. In addition to this one, the law reviews at Rutgers-Camden and Loyola of Los Angeles have symposia in the works that will take up the immunity trilogy.

resented litigant.⁹ To be sure, blackletter law held that states may not be named as defendants in suits brought before the federal district courts.¹⁰ But a variety of ways around the Eleventh Amendment were available. The enterprising litigant might have sued the responsible state official and secured either prospective injunctive relief¹¹ or an award of damages running not against the state as such, but against the state officers in their personal capacities.¹² In addition, Congress enjoyed some measure of authority to allow individuals actually to sue the state itself in certain circumstances.¹³ Finally, the Court itself remained open to review decisions of the state courts that rejected federal-law claims against states that originated in state court.¹⁴ The array of available remedial options suggested to some observers that the Eleventh Amendment did not much matter, certainly not to the enforcement of rights based upon constitutional law¹⁵ and little enough to the enforcement of federal statutes.

Alden undermines this irrelevance thesis and suggests instead that remedial options once thought secure may themselves quickly become obsolete. In this Section, I will briefly summarize the way in which *Alden* and its companion cases undermine the assumptions surrounding the enforcement of federal law against the states.

9 See, e.g., John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 81 (1998) (describing as "vanishingly small" the area where the 11th Amendment bars all relief against states).

10 See *Hans v. Louisiana*, 134 U.S. 1, 10 (1890).

11 See *Edelman v. Jordan*, 415 U.S. 651 (1974) (holding that the 11th Amendment does not bar prospective relief from continuing violation of federal statutory rights); *Ex Parte Young*, 209 U.S. 123 (1908) (holding that 11th Amendment does not forbid application for order enjoining state officer from violation of individual's due process rights under the 14th Amendment).

12 See, e.g., *Hafer v. Melo*, 502 U.S. 21, 25-31 (1991) (reaffirming the amenability of state officers to suit for damages and specifically rejecting any 11th Amendment immunity for such officers). Officials enjoy immunity from liability except where they violate "clearly established" constitutional rights. See *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

13 Congress may abrogate the immunity of the states acting pursuant to its enforcement powers under the 14th Amendment, see *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), but only if it effects such abrogation in a clear statutory text, see *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985).

14 See *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 27 (1990) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 412 (1821)).

15 See David P. Currie, *Ex Parte Young After Seminole Tribe*, 72 N.Y.U. L. REV. 547 (1997) (proclaiming *Ex Parte Young* "alive and well"); Jeffries, *supra* note 9, at 49-54 (arguing that alternative remedies substitute for suits for damages brought against the states as such); Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996) (suggesting that the Court's extension of sovereign immunity will have little real impact on federal right enforcement).

A. *The Utter Irrelevance of the Text*

The Court has long since abandoned any arguments based upon the text of the Eleventh Amendment, admitting in *Seminole Tribe* that the text alone would support what has come to be known (in the cobbled-together world of the law reviews) as the "diversity" theory.¹⁶ *Alden* underscored the irrelevance of the text and did much to cut the Court loose entirely from any purposive approach to its interpretation. For in *Alden*, the Court held that the principle of sovereign immunity that underlies the Amendment operates as a bar to suits brought in state court.¹⁷ The mere text, of course, mentions only the "Judicial power of the United States"¹⁸ and had long been understood to apply in accordance with its terms only to suits in federal courts.¹⁹ The Court achieved its result by transforming its rule of state sovereign immunity into an implicit restriction on the power of Congress under Article I of the Constitution. *Alden's* version of state sovereign immunity owes as much to the process federalism of *New York v. United States*²⁰ and *Printz v. United States*²¹ as to earlier decisions on the scope of the Eleventh Amendment.

B. *History Transformed*

In the process of transforming the judicial-power focus of the Eleventh Amendment into a restriction on congressional power, the Court has reversed the assumptions that appear to have informed the framing of Article III and the Eleventh Amendment. Although the Federalists may well have assumed the states' immunity from suit in their own courts during the 1790s, they responded by seeking to as-

16 See *Alden v. Maine*, 119 S. Ct. 2240, 2254 (1999) (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996)) (stating that the "text of the Amendment would appear to restrict only the Article III diversity jurisdiction"). For a review of the diversity explanation and its critics, see James E. Pfander, *History and State Suability: An "Explanatory" Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269 (1998).

17 See *Alden*, 119 S. Ct. at 2246-47 (describing state immunity as a fundamental attribute of sovereignty as of the time of the framing).

18 U.S. CONST. amend. XI.

19 See, e.g., *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 204-05 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-64 (1989); *Nevada v. Hall*, 440 U.S. 410, 418-21 (1979).

20 505 U.S. 144 (1992) (holding that Congress may not compel state legislatures into enacting federal rules into state law).

21 521 U.S. 898 (1997) (holding that Congress may not compel state executive branch officials to enforce or administer a federal regulatory program).

sure the availability of a federal enforcement docket.²² Inadequate state enforcement thus required a federal solution. In the century just past, the trend among the states has been to abandon sovereign immunity in their own courts, even as the Supreme Court steadily expanded the Eleventh Amendment as a barrier to the enforcement of federal rights in federal court. Curiously, in light of the steady disappearance of sovereign immunity in other contexts, *Alden* builds upon the absence of federal judicial power to support an extension of state immunity to state courts as well.²³ Instead of seeing the federal courts as a solution to non-suability in state court (as the framers did),²⁴ the Court has relied upon its own doctrine of immunity in federal court to justify restrictions on state court proceedings, restrictions that go beyond what the states have ordinarily provided themselves in suits based upon state law.²⁵

C. *The Absence of Congressional Authority*

Past decisions had given some reason to hope that Congress might retain ultimate control over the extent of state sovereign immu-

22 If the framers of Article III did not expect the states to open their courts to suits brought against the state itself, they certainly believed that the states should be responsible to individuals for breach of their federal obligations. Distrust of the willingness of state legislatures to authorize state court adjudication goes a long way to explain why Article III explicitly provides for the adjudication of suits against the states and why the framers gave the Supreme Court original jurisdiction over such matters. See James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 593-94 (1994) [hereinafter Pfander, *Rethinking*]. The 11th Amendment trimmed the judicial power in part, by denying all federal courts jurisdiction over suits to enforce obligations based upon common law tort and contract claims by diverse plaintiffs and aliens. See Pfander, *supra* note 16, at 1380-82 (arguing that the history of the 11th Amendment confirms its application to diversity-based, but not federal question, claims against the states). It thus leaves the states with a measure of control over how to structure the enforcement of state law claims against the state, and most states have chosen in large measure to abandon sovereign immunity. See James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After Seminole Tribe*, 46 UCLA L. REV. 161, 205-10 (1998) [hereinafter Pfander, *An Intermediate Solution*] (summarizing the wide array of state laws that waive sovereign immunity and provide for determination of money claims in state court).

23 See *Alden*, 119 S. Ct. at 2266 (emphasizing the absence of federal judicial power over suits against states as an argument for extending the immunity to state courts as well).

24 See *supra* note 22.

25 See *Alden*, 119 S. Ct. at 2268 (upholding the right of Maine to waive its immunity from suit on claims based upon state law and to retain immunity as to analogous federal claims and finding no improper discrimination against federal rights).

nity. In *Seminole Tribe*, for example, the Court appeared to leave Congress in charge of the vitality of the *Ex Parte Young* action in suits to enforce federal statutory rights prospectively.²⁶ The decision also hinted, somewhat ambiguously to be sure, that Congress might allow individuals to pursue retrospective relief in state court.²⁷ Such hints found support in the Court's indication in other decisions that it did not intend to revisit decisions that blocked, on Tenth Amendment grounds, the power of Congress to regulate the states as states.²⁸ One might have supposed that the power of Congress to fashion such a right of action would have carried with it the power to specify a remedy in damages for its violation. But *Alden* holds that something implicit in the Constitution bars Congress from fashioning such a remedy.

D. *The Argument from Novelty*

With its invocation of remedial options to prove its irrelevance thesis, the *Alden* Court observed that it was facing the question of suits in state court dealing with federal rights of action for the first time in

26 See *Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996) (concluding that congressional prescription of a detailed remedial scheme displaced the availability of an officer suit enforcement through reliance upon the *Ex Parte Young* exception to the 11th Amendment). For criticisms of this portion of *Seminole Tribe*, see Currie, *supra* note 15, at 550 (arguing that the Court's decision to foreclose suit against the state left no detailed remedial scheme intact to displace the otherwise presumptive availability of the *Ex Parte Young* remedy against the state official and describing the provision for suit against the state as unavailable to displace the officer suit under *Ex Parte Young*), Vicki C. Jackson, *Seminole Tribe, the Eleventh Amendment and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. REV. 495, 534 (1997) (same), and Daniel J. Meltzer, *The Seminole Decision and State Sovereign Immunity*, 1996 SUP. CT. REV. 1, 47 (same).

27 See Pfander, *An Intermediate Solution*, *supra* note 22, at 183–87 (suggesting that the *Seminole Tribe* Court's rejection of an officer suit under *Ex Parte Young* might rest upon the presumed availability of a suit against the state in state court). Of course, the decision in *Alden* forecloses suits in state court and leaves the *Ex Parte Young* section of *Seminole Tribe* wholly indefensible against the criticisms of Professors Meltzer, Jackson, and Currie.

28 See *New York v. United States*, 505 U.S. 144, 160 (1992) (taking care to distinguish *Garcia v. San Antonio Metropolitan Sanitary District*, 469 U.S. 528 (1985)). Although *Alden* does not cite *Garcia*, it does note that the United States may bring a suit for back wages to the enforce the Fair Labor Standards Act, *see Alden*, 119 S. Ct. at 2267 (noting the inapplicability of the 11th Amendment to suits brought by the United States), and thus assumes that Congress has the power to fashion a right of action against the state. Cf. *Reno v. Condon*, 120 S. Ct. 666 (2000) (upholding the power of Congress to regulate state driver licensing agencies as part of a statute regulating commerce in information drawn from such licenses).

210 years of constitutional history. The sheer novelty of the question suggested that "a federal power to subject nonconsenting States to private suits in their own courts is unnecessary to uphold the Constitution and valid federal statutes as the supreme law."²⁹ Similar arguments from novelty have been a staple of the Court's recent federalism decisions.³⁰ Such arguments convey the message that the issue cannot be of great importance to the scope of congressional remedial authority or it would have arisen long ago. They also suggest that a decision to deny effect to an act of Congress on constitutional grounds will occasion no great disruption of the established order. They finally suggest that past Congresses must have consciously refrained from overstepping well-understood constitutional boundaries and that the legislation under review represents a novel congressional encroachment upon such settled rules.

E. The Irrelevance of the State's Obligation of Non-Discrimination

Past decisions had clearly suggested that the states, even if they may have had no affirmative obligation to open their courts to federal claims, were at least obliged to refrain from discriminating against the enforcement of federal claims.³¹ As a consequence, the Court had held that the states could not close their doors to a federal right of action if they were willing to entertain an analogous state cause of action.³² It might have appeared to follow that, in cases where the Eleventh Amendment operated as a barrier to enforcement in federal courts, the states' obligation to open their courts on a non-discriminatory basis would apply with special force.

Not so. The *Alden* Court held that the state courts were free to refuse to hear suits for the enforcement of a federal claim for backpay, even though they were obliged by state law to hear suits for

29 *Alden*, 119 S. Ct. at 2240-68 (1999).

30 See, e.g., *Printz v. United States*, 521 U.S. 898, 918 (1998) (describing the persuasive force of recent congressional enactments as "outweighed by almost two centuries of apparent congressional avoidance of the practice"); *Seminole Tribe*, 517 U.S. at 71 (chiding the dissent for ignoring "the fact that the Nation survived for nearly two centuries without the question of the existence of such power ever being presented to this Court"); *New York v. United States*, 505 U.S. 144, 177 (1992) (describing the federal statute under review as "unique" in offering the state "no option other than that of implementing legislation enacted by Congress"); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 40 (1989) (Scalia, J., dissenting) (noting the absence of Supreme Court authority upholding or even identifying an instance of congressional abrogation of state sovereign immunity "over the past 200 years" and describing as "strange" this absence of reliance upon such "useful" an authority).

31 See *Felder v. Casey*, 487 U.S. 131 (1988); *Testa v. Katt*, 330 U.S. 386 (1947).

32 See *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 207 (1991).

the enforcement of a similar state claim.³³ The Court dismissed its non-discrimination principle as irrelevant and concluded that the state was free to invoke its constitutional immunity from suit in a selective manner that burdens the enforcement of federal rights.

F. *The New Relevance of Policy Arguments*

Professor David Currie has described the doctrine of sovereign immunity as a "deplorable" but unavoidable feature of our constitutional system.³⁴ No similar measure of regret informs the Court's decision to extend state sovereign immunity.³⁵ Indeed, *Alden* suggests that state sovereign immunity might make good sense, operating as a kind of insurance policy to protect the state fisc from the imposition of excessive damages awards.³⁶ Such policy justifications pose a further threat to rule-of-law values—the fisc-protection policy has no obvious stopping point as one moves from rights grounded in congressional regulation of commerce to those grounded in the Fourteenth Amendment or other constitutional provisions. The invocation of policy sows the seeds of further doctrinal growth and may give rise to confusion below.³⁷

33 See *Alden*, 119 S. Ct. at 2268 (rejecting claim of discrimination against federal right of action and applying a standard of "systematic fashion to discriminate" against federal rights that appears nowhere in prior cases and leaves states free to selectively refuse enforcement to federal causes of action).

34 See Currie, *supra* note 15, at 548.

35 One can find the faint tone of regret, however muted, in the Court's efforts to remind parties that other modes of securing relief remain available. See *Seminole Tribe*, 517 U.S. at 71 n.14 (emphasizing "other methods of ensuring the States' compliance with federal law"); cf. *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 273–74 (1997) (plurality opinion) (describing the Court's 11th Amendment jurisprudence in terms of a balance between state immunity and federal supremacy and treating availability of state court remedies as a decisive factor in the balance); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105–06 (1984) (describing the need to balance "the supremacy of federal law" against the "constitutional immunity of the States" and concluding that the balance tipped in favor of immunity in suits based upon state law). The *Alden* Court adverts to the *Pennhurst* balancing test and the need to assure federal supremacy, but its portrait of sovereign immunity as a positive good may portend further expansions to come.

36 See *Alden*, 119 S. Ct. at 2264 (noting that suits for money damages may threaten the financial integrity of the state and, when instituted through an act of Congress, may place an "unwarranted strain" on the ability of the states to govern in accordance with the will of their citizens).

37 In my judgment, the right of private suitors to bring actions for injunctive relief to enforce rights under federal statutes—particularly those that create a liability that runs against states and may be enforced in suits brought by the federal government—represents a likely future casualty of expanding state sovereign immunity.

III. NEW DIRECTIONS IN ELEVENTH AMENDMENT SCHOLARSHIP

With the Court's turn away from the prior learning and its resistance to academic criticism, perhaps it will see little virtue in the development of a broader agenda for research in the area of sovereign immunity. But scholars should work as much to understand as to persuade, and we have much to learn about what motivates the Justices in the majority. In this Part, I will hazard a few guesses on the subject and consider what might lie ahead for academics interested in studying the growth of state sovereignty.

A. *Accounting for the Revival of Sovereign Immunity*

Among other puzzles, we need to account for the Court's stubborn insistence on reviving and extending sovereign immunity—a doctrine that everywhere else appears to have largely disappeared.³⁸ Twenty-five years ago, it appeared sensible to say that sovereign immunity was simply a matter of judge-made common law that Congress might well override.³⁹ The doctrine has bulked up considerably since then, and we need to learn why.

1. The Failure of the Political Safeguards

Much of what the Court has done in the past two decades can be seen as predicated upon the assumption that Congress, when pressed, would decline to create federal statutory liability running directly against the states. The Court has created a variety of clear-statement rules, each of which frustrated the apparent goals of a particular remedial scheme, but which could have been said to serve the larger interest in energizing state political opposition to future legislation.⁴⁰ Perhaps to the Court's surprise, such state opposition, if indeed it has arisen, has failed to prevent the passage of a new series of statutes, each more detailed than the past, that provides for the abrogation of state sovereign immunity. In recent years, the Court has faced clear

38 On the disappearance of sovereign immunity from the world of international commerce, see Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity, and Constitutional Compromise*, 52 *RUTGERS L.J.* (forthcoming 2000) (noting the distinction in foreign sovereign immunity law between the nation's public acts and those that are of a private, commercial nature).

39 See Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines*, 126 *U. PA. L. REV.* 515, 538–40 (1978).

40 For evidence of a link between clear-statement rules and the political safeguards of federalism, see Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 *ARIZ. L. REV.* 793, 809 (1996) (linking clear statement requirements to the political safeguards).

abrogations of state immunity in federal environmental,⁴¹ bankruptcy,⁴² intellectual property,⁴³ labor protective,⁴⁴ and Indian affairs legislation.⁴⁵ Although the changing role of the states in commercial activities may help to explain these statutes, the Court may perceive their adoption as evidence of the failure of the political safeguards and of the need for expanded constitutional protection.⁴⁶

2. The Court's Desire to Calibrate Remedial Potency

What with its worries about the political safeguards and the need for clear statements, the Court has led Congress on a merry chase these past several years.⁴⁷ Perhaps the cycle of legislative action followed by ever more demanding clear-statement requirements reflects a judicial preference for retaining control over what one might call the potency of the remedial scheme. Such a preference appears curiously out of phase with the Court's own insistence on legislative pri-

41 See *Union Gas Co. v. Pennsylvania*, 491 U.S. 1, 10–11 (1989) (concluding that federal super-fund legislation clearly contemplated the recovery of clean-up costs in suits brought against the states).

42 See S. Elizabeth Gibson, *Sovereign Immunity in Bankruptcy: The Next Chapter*, 70 AM. BANKR. L.J. 195 (1996) (describing Congress's decision to abrogate state immunity from suit in bankruptcy).

43 On the clarity of the abrogations of state immunity from suits to enforce patent and copyright laws, see *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S. Ct. 2219 (1999), and *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 119 S. Ct. 2199 (1999) and .

44 See *Alden v. Maine*, 119 S. Ct. 2240, 2246 (1999) (addressing the constitutionality of Congress's decision in the Fair Labor Standards Act to authorize private actions against states in their own courts).

45 See *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (holding that Indian gaming regulatory act satisfied clear-statement requirement).

46 For similar suggestions, see Althouse, *supra* note 40, at 812–22 (arguing that the Court's invigoration of sovereign immunity safeguards seeks to give both state and federal legislatures a chance to demonstrate a capacity for legislation that respects the interests of the other body), and Jackson, *supra* note 38 (ascribing the Court's expansion of sovereign immunity to mistrust of Congress).

47 Consider, for example, the history of the Fair Labor Standards Act itself. Congress first extended the Act to cover public-sector employees in 1966. See Fair Labor Standards Amendments of 1966, Pub. L. No. 94-12, § 102(a), 80 Stat. 830, 831 (codified as amended in 29 U.S.C. § 203(e)). The Court subsequently ruled that the statute failed to specify the suability of state governments with the requisite clarity to support a conclusion that the states had consented to such suits. See *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973). Following the adoption of the requisite statutory clarification in 1974, the Court ruled that Congress lacked power under the 10th Amendment to regulate the states as states. See *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

macy in the creation of private rights of action but may help to account for its hostility to legislative provisions for suits for money damages.⁴⁸

In a simpler day, it might have appeared that the role of Congress was limited to the enunciation of rights and the task of the federal courts, working within the assumptions of the common law, was to secure their enforcement. We inherited a common-law presumption that the courts were to secure, through some appropriate means, the enforcement of any rights that the legislature chose to fashion (within constitutional limits).⁴⁹ One can see the world of innovative judicial enforcement reflected in such old standards as *Osborn v. Bank of the United States*⁵⁰ and in the presumptive availability of actions in debt to enforce penal statutes.⁵¹ Some judicial control of the contours of available relief inhered in such a system of legislative minimalism.

Throughout the century just ended, the Court pushed to secure alternative foundations for much that was previously the province of the judge-made common law. The *Erie* doctrine not only banished

48 On the Court's reluctance to recognize implied causes of action, see RICHARD L. FALLON ET AL. HART & WESCHLER'S FEDERAL COURTS AND THE FEDERAL SYSTEM 840-41 (4th ed. 1996). To be sure, the rights of action placed in Congress's keeping under such an approach run primarily against private defendants, rather than state actors. Moreover, the availability of 42 U.S.C. § 1983 (1994) may help to secure enforcement of federal statutes against state and local governments to some extent. See *id.* at 1133-37 (describing use of 42 U.S.C. § 1983 (1994) as a remedy for the violation of other federal statutes). But the Court's emphasis on Congress's primacy in prescribing remedial rules at least raises a question about its unwillingness to defer to Congress in connection with the need for damages liability to enforce certain rights against the states.

49 For the historic linkage of rights and remedies, see 3 WILLIAM BLACKSTONE, COMMENTARIES *23 ("[W]here there is a legal right, there is also a legal remedy."), quoted in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (equating rights and remedies), and in Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987). For doubts that the Constitution compels the right-remedy equation, see John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999).

50 22 U.S. (9 Wheat.) 738 (1824). In *Osborn*, Chief Justice Marshall massaged the rules of injunctive relief to secure its availability in a suit against the officers of the state. See *id.* at 838-46 (rejecting Ohio's claim that only those banks with exclusive charters could seek to enjoin a trespass).

51 See JOHN COMYN, 1 A DIGEST OF THE LAWS OF ENGLAND 225 (1785) (noting that "[u]pon every statute, made for the Remedy of any Injury, Mischief, or Grievance, an Action lies by the Party grieved, either by the express Words of the Statute, or by Implication"). This rule of presumptive enforcement has given way to a rule that federal courts should generally refrain from enforcing rights unless Congress has created an explicit right of action. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION 380-81 (3d ed. 1999).

general common law in diversity but also threatened the judicial control of remedial potency in the realm of officer suit litigation.⁵² The Court's doctrine of official immunity placed federal officers beyond the reach of common law rights of action;⁵³ its doctrine of sovereign immunity shielded state actors from the enforcement of state common law restrictions in federal court.⁵⁴ The Court's hostility to implied rights of action, which has grown in recent years, requires Congress to speak clearly to bring the federal courts' remedial authority into play.⁵⁵ All of these developments have contributed to what Judge Guido Calabresi called, in a different context, the "statutorification" of the law.⁵⁶

With the rise of statutes and the Court's own insistence that Congress take the lead in fashioning remedial details may come a corresponding reduction in the power of the Court to tailor judicial remedies in accordance with its own conception of the significance of the right in question. One can perhaps see some attempt on the Court's part to recover a power of judicial tailoring in its continuing, if somewhat half-hearted, willingness to allow Congress to abrogate state immunity in statutes enacted to enforce the Fourteenth Amendment.⁵⁷ The political salience of the rights in question may explain,

52 See James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 Nw. U. L. REV. 899, 977-78 n.294 (1997) (linking *Erie* and the demise of general federal common law to the decision in *Bivens* to fashion a new federal right of action based upon the interpretation of the Constitution).

53 See *Butz v. Economou*, 438 U.S. 478, 495 (1978) (distinguishing between federal officer's absolute immunity from suit for damages flowing from a common law tort based upon state law and such officer's qualified immunity from suits based upon federal statutory or constitutional violations).

54 See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (applying the 11th Amendment as a bar to the prospective enforcement of state law limits on the conduct of state actors).

55 See CHEMERINSKY, *supra* note 49, at 380-81 (3d ed. 1999) (describing the Court's adoption of rules for the implication of private rights of action that emphasize separation-of-powers concerns and the need to protect the primacy of Congress in creating the right of action).

56 See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 1 (1982).

57 See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (upholding the power of Congress to create a right of action running directly against the state and enforceable in federal court in the exercise of its powers under the 14th Amendment); cf. *Alden v. Maine*, 119 S. Ct. 2240, 2267 (1999) (reaffirming *Fitzpatrick* as the product of the exercise of congressional abrogation power under the 14th Amendment). One can see the half-hearted quality of the Court's commitment to abrogation authority under the 14th Amendment in decisions that narrow the scope of congressional power and carefully scrutinize the justifications that Congress offers in effecting an abrogation. See *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (holding that Congress lacks power to

in part, the Court's willingness to afford Congress a broader power of abrogation in that setting than in the more consistently controversial realm of Commerce Clause regulation.

3. The Influence of Tort Reform

Tort reform may help to explain the Court's new attitude toward state suability. Tort reformers worry that the civil liability system in this country has run amok, resulting in extravagant awards from gullible juries. The Court has considered a number of questions in recent years that reflect concerns broadly related to tort reform.⁵⁸ One might suppose that the Court's desire to shield the states from the burden of defending what the Court may view as potentially ruinous suits for damages might help to explain recent developments. *Alden* itself emphasizes the policy of protecting the state fisc and suggests a kind of insurance rationale for the doctrine of state sovereign immunity.⁵⁹ Moreover, the Court's recent decisions appear to preserve at least some measure of state suability in actions for injunctive and de-

abrogate state immunity to secure enforcement of rights to freedom from age discrimination and applying the test of congruence and proportionality in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199 (1999) (holding that Congress lacks power under the 14th Amendment Due Process Clause to enforce patent rights against the states and that there was no evidence of unremedied state violations sufficient to support congressional action). The absence of any congressional power to expand the scope of rights that individuals hold against the state beyond those specified in the Court's own decisions interpreting the 14th Amendment have suggested to some observers that 42 U.S.C. § 1983 (1994) itself may have become superfluous on the theory that individuals enjoy a constitutional right to enforce the Constitution against the states—a right that Congress can neither expand nor contract. If so, then we have traveled quite some distance from the days when the conservative wing of the Court dissented from the decision in *Bivens* on the basis that Congress had failed to provide for suits against federal officers. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388, 427–28 (1971) (Black, J., dissenting) (arguing that while Congress could enact laws to provide for suits against federal officers for the violation of constitutional rights, its failure to have done so precluded the Court from recognizing a right of action as implicit in the Fourth Amendment.) Instead of arguing for deference to congressional guidance, the Court now appears to view that guidance as largely irrelevant.

58 See, e.g., *Ortiz v. Fibreboard Corp.*, 119 S. Ct. 2295, 2302 (1999) (reasserting a call for a national legislative solution to the “elephantine mass of asbestos cases”); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (concluding that federal regulation of medical devices does not pre-empt personal injury claims under state tort law); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (holding that due process limits the extent of state punitive damages awards).

59 See *Alden*, 119 S. Ct. at 2264 (asserting that suits for money damages may “threaten the financial integrity of the States”).

claratory relief, even as they foreclose suits for damages.⁶⁰ The selective foreclosure of suits for damages may reflect a concern with deep pockets, runaway juries, and sizable awards.

4. The Court's Worries About State Competence

Court watchers have long rated those who appear on behalf of state and local governments as among the least accomplished advocates to the Court.⁶¹ This tradition of inadequate advocacy, though no doubt ameliorated by the amicus briefs of the State and Local Legal Center, may have subtly persuaded the Justices that the taxpayers who underwrite the costs of state and local governments need protection from the financial consequences of official ineptitude. In contrast to the attorneys who represent private interests before the Court and who subtly enforce the notion that firms can conform their conduct to the law and avoid unexpected liability, the attorneys who appear for state and local governments may send a message of needed protection.⁶²

60 See *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 296 (1997) (O'Connor, J., concurring in part) (joining plurality opinion in finding an 11th Amendment barrier to officer suit for injunctive relief to challenge state ownership of submerged lands but reaffirming the general availability of injunctive relief to foreclose ongoing violations of federal law); *Seminole Tribe v. Florida*, 517 U.S. 44, 74 (1996) (refusing to permit action for injunctive relief against state officer but basing decision on interpretation of statute that Congress was free to amend).

61 See Douglas Ross & Michael W. Catalano, *How State and Local Government Fared in the United States Supreme Court for the Past Five Terms*, 20 URB. LAW 341, 341 (1988). For an account of efforts to improve state representation in the Supreme Court, including efforts to "develop in-depth moot court and brief writing programs and efforts to coordinate amicus curiae activity of states," ultimately culminating in the creation of the State and Local Legal Center "to advance and defend the interests of state and local government within the federal system," see Lee Epstein, *Interest Group Litigation During the Rehnquist Court Era*, 9 J.L. & POL. 639, 670-71 (1993) (quoting Ross & Catalano, *supra*, at 342).

62 Cf. Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 556-57 (1967) (suggesting that the willingness of the courts in England to excuse sailors from a strict adherence to their legal duties may have encouraged a lack of responsibility on the part of those the courts sought to help). Of course, the competence explanation does not account for the Court's distinction between state and local governments. In general, the Court has been far less protective of local than of state governments, despite the fact that many observers would agree that the attorneys for local governments generally make less effective presentations to the Court than their state counterparts.

5. Intuitive Originalism

The *Alden* decision reveals a curious sort of commitment to originalist interpretive premises. On the one hand, it appears quite apparent that the Court's denial of access to a state forum for the enforcement of federal statutory rights represents a working-out of the implications of its decision in *Seminole Tribe*.⁶³ On the other hand, the Court repeatedly refers to the expectations of the framers of the Constitution. But the Court relies not on any formal originalist inquiry; recall that it had previously admitted that the mere text of the Eleventh Amendment would apply only to diverse-party litigation and would not appear to apply to state courts at all. Instead, the Court relied upon its own conception of how the framers would have likely resolved the issue of access to state courts had it been presented to them.

The relevant passage appears in a section of Justice Kennedy's majority opinion that he nominally devotes to a consideration of "evidence of the original understanding of the Constitution."⁶⁴ He concludes his analysis of that understanding with the following passage:

In light of the historical record it is difficult to believe that the Constitution would have been adopted if it had been understood to strip the States of immunity from suit in their own courts and cede to the Federal Government a power to subject nonconsenting States to private suits in these fora.⁶⁵

This remarkable passage—echoing a comment that Justice Kennedy made during oral argument⁶⁶—proposes to base a jurisprudence of original intention on the Justice's own intuitive reconstruction of the framers' likely attitude toward an issue that did not arise during debates over ratification. Whatever the relevance of the question to the issue in *Alden* and whatever the propriety of such an approach to originalism—and many originalists have steered away from reliance on attempted reconstructions of the intent, real or imagined, of the framers⁶⁷—the comment may reflect some lingering belief in the relevance of the historical record.

63 See *Alden*, 119 S. Ct. at 2265 (characterizing as anomalous an interpretation of immunity that would permit Congress to wield "greater power in the state courts than in its own judicial instrumentalities").

64 *Id.* at 2260.

65 *Id.* at 2261.

66 See Transcript of Oral Argument, 68 U.S.L.W. 3001 (U.S. July 6, 1999) (quoting Justice Kennedy's assertion at oral argument to the effect that the framers were unlikely to have contemplated the imposition of suits against states in state court).

67 See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 163 (1990) (rejecting notion that the philosophy of originalism entails deciding cases the way the participants in

B. *Toward a Broader Inquiry into State Sovereign Immunity*

Building on these possible accounts of the Court's decision to broaden state sovereign immunity, one might develop areas of scholarly inquiry that may better explain and inform the Court's work in the field. Whether any of these fields of inquiry will yield persuasive insights remains, of course, quite problematic.

1. Separation of Powers

Although many observers have identified state legislative control of the fisc as a factor in Eleventh Amendment developments,⁶⁸ we still await a detailed consideration of the influence of separation-of-powers questions on state suability. In the beginning, public creditors sought compensation by filing legislative petitions with the colonial assemblies, praying for an appropriation of funds to pay the debt in question. Legislators thus viewed claims processing as linked to the power to tax and to spend and were jealous of any judicial pretensions in the area. The rise of separation-of-powers thinking coupled with distrust of all-powerful state assemblies led to the perception that courts might more properly play this adjudicative function. By the time of the framing, republican theory pointed pretty clearly toward the creation of a judicial role.⁶⁹

The judicial role took some time to develop, depending as it did on the legislative decision to create a mode through which individuals might present their governmental claims to the courts. At least by the past century, however, the judicial role was fairly well established. Thus, both the state and federal governments had (for the most part) created judicial machinery for the determination of contract claims and had shifted responsibility for government torts from the individual officers to the state itself.⁷⁰ As a consequence, private bills play a less important role in routine determination of public claims as legislatures have come to rely upon the courts for adjudication and have

the ratifying conventions of the day would have done and acknowledging that the ratifying conventions would likely split on any closely disputed question).

68 See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406 (1821) (describing the 11th Amendment as a product of the Court's decision to uphold its jurisdiction over claims against "greatly indebted" states).

69 See generally Pfander, *supra* note 50, at 929–45 (summarizing the shift from legislative to judicial processing of claims against the state in post-Revolutionary America).

70 See *id.* at 964–65 (sketching the history of the federal court of claims and of the passage of the Federal Tort Claims Act); Pfander, *An Intermediate Solution*, *supra* note 21, at 205–08 (sketching the statutes in which the state legislatures permit state courts to adjudicate claims against the states).

adopted some, more or less, routine modes for the payment of any judgments that the courts render.⁷¹

With the growing reliance upon judicial modes, the function of sovereign immunity may well have changed dramatically. During the heyday of the legislative petition, sovereign immunity operated as a barrier to judicial processing and served to assure legislative primacy in the determination and payment of claims. Today, legislative assemblies may take the position that individuals should seek a judicial determination of the claims against the government and may not seek private bill relief in the face of judicial denials.⁷² The unavailability of private bill relief suggests that the deployment of sovereign immunity does not simply shift the forum for determination of the claim from the courts to the legislative branch; it denies relief altogether. Indeed, the *Alden* decision makes sense only as an attempt to perfect the immunity from money damages liability in state court litigation that the Court understood itself to have conferred upon the states in *Seminole Tribe*.⁷³

This separation-of-powers focus suggests that the Court in *Alden* faced an issue of sovereign immunity that differed in functional terms from those that had arisen during the eighteenth and nineteenth centuries, before routine reliance on judicial decisionmaking. The historical immunity of the sovereign in both its own courts and other courts secured not a regime of non-liability, but rather a regime of legislative primacy. (Article III's provision for the exercise of diversity jurisdiction over suits brought against states by aliens and non-residents underscores this legislative primacy account; it assumes that residents, not outsiders, will receive fair treatment at the hands of their own legislative assembly.) Today, the fact that Maine and other states have exercised that primacy to create a judicial mode of claims determination and payment makes it difficult to identify any affront to the

71 At the federal level, the Judgment Fund now provides for routine payment of claims against the United States. See 31 U.S.C. § 1304 (1994). In Illinois, state law provides for the routine payment of claims allowed by decision of the Illinois Court of Claims, at least up to the amount of \$5000. See 705 ILL. COMP. STAT. 505/24 (West 1999).

72 Although private bill relief remains available for victims of government torts who cannot recover under existing law, the shift to judicial processing of many such claims has lessened its significance. See Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625 (1985) (tracing the shift to judicial processing).

73 For the suggestion that the Court had intended to fashion such an immunity all along and did not contemplate a shift to litigation in state courts, see Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity*, 106 YALE L.J. 1683, 1722-26 (1997).

forum sovereign from Congress's decision to rely upon the same mode for the determination and payment of federal claims.

To be sure, some states may have retained full sovereign immunity and may continue to pass upon the claims of public creditors through private bill processes.⁷⁴ The existence of such a regime of retained legislative claims processing could present difficult questions. One might question whether Congress could constitutionally insist upon judicial processing of claims that the state processes through private bill.⁷⁵ Alternatively, one might doubt that the availability of private bill processes could meet any relevant constitutional requirements of due process of law.⁷⁶ But such questions were quite remote from the question the Court actually considered in *Alden*.

A separation-of-powers inquiry might also help to answer the *Alden* Court's concern with novelty. In the eighteenth-century world of routine legislative processing of private bills, Congress would have no occasion to prescribe a judicial mode for the assertion of claims against the states in the states' own courts. But with this century's growing reliance upon judicial modes for the enforcement of claims against the fisc and the desuetude of the private bill practice, judicial relief may represent the only game in town. The novelty of the *Alden* decision may thus lie less in Congress's provision for a judicial mode than in the Court's willingness to provide the state with a constitutional right to discriminate against the assertion of claims based upon federal law. Such an outcome appears both novel and quite divorced

74 See, e.g., Pfander, *An Intermediate Solution*, *supra* note 22, at 206 n.166 (noting that Texas and Vermont legislatures retain control over claims for breach of contract against the state).

75 One can argue that this claim, not present in *Alden* due to the state of Maine's shift to a judicial mode of claims determination, was squarely presented in another petition. See *Jacoby v. Arkansas Dep't of Educ.*, 962 S.W.2d 773 (Ark. 1998) (holding that Arkansas courts must entertain federal claim against the state despite the absence of any provision for the adjudication of state law claims), *cert. granted*, 119 S. Ct. 2387 (1999) (vacating and remanding in light of *Alden*).

76 Among the bedrock principles of American constitutionalism, due process has long entailed a commitment to judicial process. See JULIUS GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801*, at 101-02, 436 n.123 (1971) (arguing that the distinctive feature of the guarantee of due process of law, as it appears in the Bill of Rights, was to secure judicial determination of one's claim, in preference to a legislative determination). The Court's suggestion that the states might discharge their due process obligations through legislative claims processing rejects several centuries of Anglo-American jurisprudence. See *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 119 S. Ct. 2199, 2209 n.9 (1999) (noting the availability of remedies both through private bill and through suit to recover for a taking or a conversion).

from any state interest in protecting the fisc from judicially determined liability.

2. Understanding Agency Incentives

Just as we might benefit from a better understanding of the implications of the shift from legislative to judicial claims determination, we need to focus attention on the incentives that agencies face in deciding how to allocate resources so as to minimize the likelihood of a breach of state and federal law. Suppose that the agency in Maine faced a budget shortfall and chose to underpay its employees in an effort to shift the cost of overtime off its budget. A successful suit by the employees might result in ultimate payment, not from the accounts of the breaching agency, but from the general revenue accounts of the state. Moreover, the burden of paying the attorney's fees to defend the agency's misconduct might well fall upon the state's attorney general and not on the agency itself. State agencies that have no obligation to internalize the cost of their breaches will face, the economists remind us, inadequate incentives to conform their conduct to the law.⁷⁷

We have had too little scholarship on the subject of how to structure liability and immunity incentives that will both keep government agencies within the law and do so without overdetering them from conducting their official business.⁷⁸ Interestingly, we may have to look outside the world of sovereign immunity law for help, to those who have examined government incentives from other perspectives. We may well find that incentives that work well for, say, IRS agents do

⁷⁷ Interestingly, the federal government has taken steps to prevent such skewed agency incentives. The Judgment Fund, 31 U.S.C. § 1304 (1994), generally provides for the payment of judgments against the United States and its officers (in their official capacities) from a standing appropriation of funds from the Treasury. Yet the law requires agencies whose actions result in judgment for breach of contract to reimburse the Treasury out of the agency's own appropriated funds. Similarly, the law calls for the payment of amounts to indemnify officers for judgments rendered against them in their personal capacity (as in a *Bivens* action) from the agency's own appropriation. See generally U.S. GEN. ACCT. OFF., 3 PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 14-15 to -24 (2d ed. 1994). The law's evident attempt to require federal agencies to retain responsibility for the payment of at least some judgments resulting from agency action, especially in the contract arena, helps to assure us that the agency will not have budgetary incentives to violate the law as a way to shift certain costs to a different pool of appropriated funds.

⁷⁸ For notable attempts to understand agency incentives, see PETER SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* (1983), and Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV. 249.

not work as well for local police officials.⁷⁹ A remedial scheme for the Fourth Amendment may need to take account of the law enforcement context and may well differ from that needed to enforce other federal rights.⁸⁰

One can find some evidence that the Court seeks to fashion such a selective enforcement scheme. On the one hand, the Court has held in a variety of recent decisions that, notwithstanding the doctrine of sovereign immunity, the states themselves may owe a constitutional obligation in certain circumstances to provide retrospective relief against the state itself.⁸¹ Yet the Court has been careful to refrain from creating any such generally applicable rule of entity liability for relief in the nature of damages. By linking the states' obligation to pay damages to specific constitutional provisions, the Court has preserved its ability to tailor the nature and potency of the required relief to the particular constitutional violation in question. While such a selective approach maximizes the Court's control over remedial potency, we have little reason to believe that the approach rests upon any deep understanding of the manner in which its rules interact with agency incentives within the particular fields. Certainly, one finds no

79 Tales of abuse at the hands of IRS agents gave rise to extensive congressional hearings but little in the way of concrete change in liability rules. See, e.g., Seth Kaufman, *IRS Restructuring and Reform Act of 1998: Monopoly of Force, Administrative Accountability, and Due Process*, 58 ADMIN. L. REV. 819 (1998) (describing the 1997 hearings into IRS abuse and the eventual adoption of a statute that simply reduced the showing required to recover damages under existing law from abusive agents). On the interplay of remedial schemes that apply to the work of the local constabulary, see Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (considering a variety of remedial schemes to enforce rights under the Fourth Amendment, including suits against officials for money damages and motions to invoke the exclusionary rule).

80 Interestingly, it was just such a call for particularized study of the details of existing remedial schemes that then-Professor Scalia issued in his 1970 article on the operation of the doctrine of sovereign immunity within the federal government. See Scalia, *supra* note 1. Professor Scalia regarded some of the disparities in the doctrine's application as having resulted from historical accident and as defying any attempt at scholarly synthesis or generalization. See *id.* at 912-20 (arguing that the Court's selective invocation of sovereign immunity as a bar to the judicial review of federal government action reflects historic distinctions between various categories of claims and not the working out of some broader principle of immunity).

81 See, e.g., *Reich v. Collins*, 513 U.S. 106 (1994) (holding that the Due Process Clause requires states to provide "meaningful backward-looking relief" when they purport to provide a postdeprivation remedy); *McKesson Corp. v. Division of Alcoholic Beverages*, 496 U.S. 18, 31 (1990) (same); *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304 (1987) (holding that the Just Compensation Clause requires governments to provide a monetary remedy for a taking of property, notwithstanding sovereign immunity).

evidence of empiricism, casual or otherwise, in the Court's selective approach to entity liability.⁸²

3. The Turn to Comparative Law

Constitutional law and federal courts scholars have turned with increasing frequency to comparative research for new insights into the operation of American federalism.⁸³ Such a turn may make sense in the realm of sovereign immunity. Indeed, during much the same period that the Supreme Court of the United States has fashioned bold new rules of immunity in *Seminole Tribe* and *Alden*, the European Court of Justice (ECJ) has announced similarly important judge-made changes in the law of member state judicial liability within the European Union. Yet in Europe, the ECJ has moved in precisely the opposite direction.

In *Francovich v. Italy*,⁸⁴ the ECJ held that the member state courts must entertain private suits against the state itself for damages resulting from the state's failure to discharge its duties under European law. More than simply a decision to refrain from interposing a judge-made doctrine of sovereign immunity to block a right of action that the legislative body had put in place, *Francovich* invoked unwritten structural precepts much like those in *Alden* to support its creation of a judge-made right of action designed to secure member state compliance with the harmonization law of Europe. Five years later, in *Brasserie du Pêcheur/Factortame III*,⁸⁵ the ECJ refined and extended its *Francovich* rule.⁸⁶ The animating principle in Europe thus appears to be one of broader member state accountability to the rules of the center, a prin-

82 See *College Sav. Bank v. Florida Prepaid Educ. Expense Bd.*, 119 S. Ct. 2219, 2233 (Scalia, J.) (scornfully dismissing the dissent's pragmatic argument in favor of legislative flexibility and its emphasis on the need to regulate states that chose to participate in ordinary commercial activities).

83 See, e.g., VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* (1999); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

84 1991 E.C.R. I-5357.

85 Cases C-46 & 48/93, *Brasserie du Pêcheur SA v. Germany*, 1996 E.C.R. I-1029.

86 For commentary on *Francovich* and *Brasserie*, see Roberto Caranta, *Judicial Protection Against Member States: A New Jus Commune Takes Shape*, 32 COMMON MKT. L. REV. 703 (1995), Roberto Caranta, *Governmental Liability After Francovich*, 52 CAMBRIDGE L.J. 272 (1993), and Carol Harlow, *Francovich and the Problem of the Disobedient State*, 2 EUR. L.J. 199 (1996). For an economic approach to the standard of member state liability that seeks to avoid over-deterrence, see Roger Van den Bergh & Hans-Bernd Schäfer, *State Liability for Infringement of the EC Treaty: Economic Arguments in Support of a Rule of "Obvious Negligence,"* 23 EUR. L. REV. 552 (1998).

ciple quite different from that which animates state immunity law in the United States.

Of course, one has reason to predict that comparative work will prove no more influential with the *Alden* majority than other scholarly efforts in recent years. The attitude that Justice Scalia expressed toward such work—that the distinctive quality of American federalism defies productive comparison to other federal governments—may represent the views of the majority.⁸⁷ But comparative work still offers valuable descriptive insights into the Court's own conception of its role in defending the states from an overreaching Congress.

IV. THE CONTRIBUTIONS TO THIS SYMPOSIUM

Like many who have commented on *Alden*,⁸⁸ the contributors to the AALS panel discussion and this Symposium range in attitude from the insouciant to the indignant. Two of the principal contributors, Carlos Vázquez and Ann Woolhandler, have previously articulated a somewhat limited conception of the scope of congressional power to impose suits upon the states and a corresponding openness to the Court's new sovereign immunity jurisprudence.⁸⁹ Both refine their views here. In *Old Property, New Property, and Sovereign Immunity*,⁹⁰ Professor Woolhandler describes her own reaction to *Alden* as of the "no big deal" variety and goes on to propose a distinction between the sorts of remedies needed to secure nineteenth and twentieth-century property rights from state deprivation.⁹¹ In *Eleventh Amendment Schizo-*

87 See *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) (dismissing the idea that comparative analysis of the constitutions of European Union and the United States might inform the interpretive process).

88 See Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011 (2000) (contrasting the highly critical view of Charles Fried with the more sanguine assessment of Kathleen Sullivan). Professor Meltzer nicely captures the range of reactions and suggests that, for reasons bound up with the differing values of the two disciplines, those who teach federal courts may tend as a group to view the decisions as more troubling than those who teach constitutional law. See *id.*

89 See Carlos Manuel Vázquez, *What Is Eleventh Amendment Immunity?*, 106 YALE L.J. 1683 (1997); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77 (1998).

90 Ann Woolhandler, *Old Property, New Property, and Sovereign Immunity*, 75 NOTRE DAME L. REV. 919 (2000).

91 See *id.* Professor Woolhandler notes the willingness of the Court to fashion fairly complete remedies for governmental invasions of "old property," but suggests reasons why the Court might rightly take a less demanding approach to the creation of remedies for similar violations of such "new property" rights as entitlements under new federal regulatory statutes.

phrenia,⁹² Professor Vázquez appears somewhat more concerned, acknowledging that strands of immunity rhetoric in the Court's decisions may pose a more significant threat to the rule of law and federal supremacy. Professor Jay Tidmarsh, in *A Dialogic Defense of Alden*, also offers qualified support for the Court's latest work with an interesting, dialogic approach to the decision.⁹³

Judge William Fletcher, who presented a principal paper at the AALS panel discussion, and Professor Vicki Jackson, who offered comments at the panel and has expanded her contribution here, do not appear so sanguine.⁹⁴ Although Judge Fletcher sees the *Alden* decision as supportable, he has a good many questions about *Seminole Tribe* and about the Court's continuing distinction between fairly broad immunity for state governments and fairly strict accountability for local governments. He also raises an interesting doubt about the durability of the Court's proposed distinction between Commerce Clause and Fourteenth Amendment abrogation. Professor Jackson remains quite critical of the Court's new direction, frankly calling upon the Court to reverse itself and for scholars and other observers to maintain the drumbeat of criticism that she hopes may speed the eventual arrival of such a reversal. She also offers a detailed critique of the work of Professors Vázquez and Woolhandler.

Daniel Meltzer also finds the recent decisions more difficult to defend. In *State Sovereign Immunity: Five Authors in Search of a Theory*,⁹⁵ Professor Meltzer characterizes the Court's recent sovereign immunity decisions as undertheorized, ineffectual, and counterproductive.⁹⁶ He thus concludes that they do not make up a coherent body of law that will remain stable into the future. Either state sovereign immunity will continue to grow in significance as the Court attempts to protect its principle from congressional evasion, Professor Meltzer believes, or the Court will change course and overrule the decisions in *Seminole Tribe* and *Alden*.⁹⁷ Perhaps it is this instability that justifies the

92 Carlos Manuel Vázquez, *Eleventh Amendment Schizophrenia*, 75 NOTRE DAME L. REV. 859 (2000).

93 See Jay Tidmarsh, *A Dialogic Defense of Alden*, 75 NOTRE DAME L. REV. 1161 (2000).

94 See William A. Fletcher, *The Eleventh Amendment: Unfinished Business*, 75 NOTRE DAME L. REV. 843 (2000); Vicki C. Jackson, *Principle and Compromise in Constitutional Adjudication: The Eleventh Amendment and State Sovereign Immunity*, 75 NOTRE DAME L. REV. 953 (2000).

95 Meltzer, *supra* note 88, at 1011.

96 See *id.* at 1011, 1052.

97 See *id.* at 1054.

dissent's invocation of the ghost of *Lochner* to describe the majority's nascent and growing immunity doctrine.

Many contributors to this Symposium share Professor Meltzer's concern with the Court's analytical technique and his emphasis on the narrowness of the current five-Justice majority whose views have controlled the outcome of recent cases. In *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*,⁹⁸ Daniel Farber describes the Court's recent round of decisions as driven by a conception of state sovereignty that ignores "conventional legal arguments" and expresses, at most, half-hearted concern with functional considerations. John Orth shares Professor Farber's poor opinion of the Court's technique, focusing in particular on the Court's attempt to invoke an official history, "authoritatively laid down from on high and no longer open to question."⁹⁹ In *State Immunity, Political Accountability, and Alden v. Maine*,¹⁰⁰ William Marshall and Jason Cowart consider the Court's novel emphasis on political accountability as an interesting, but ultimately inadequate, justification for its expansion of immunity. John Nowak goes Farber and Orth one better in *The Gang of Five & the Second Coming of an Anti-Reconstruction Supreme Court*¹⁰¹—a candid, broad-ranging, and thoroughly unreconstructed criticism of the five-Justice majority. Professor Nowak, like Suzanna Sherry in *States Are People Too*,¹⁰² hears an echo from the nineteenth century in the Rehnquist Court's new state sovereign immunity decisions. For Professor Nowak, the echo comes from the hostility to minority race persons that led to nineteenth-century decisions dismantling Reconstruction. For Professor Sherry, recent decisions conferring a dignitary status on states resemble those that led to personhood for corporations over one hundred years ago.

Underlying these criticisms of technique and outcome, one finds a widespread concern with the question of why this Court has chosen to invigorate the doctrine of state sovereign immunity. Professor Meltzer offers a variety of possible and interlocking explanations, including the Court's doubts as to the efficacy of the political safeguards of federalism, its resistance to what it views as congressional efforts to

98 Daniel Farber, *Pledging a New Allegiance: An Essay on Sovereignty and the New Federalism*, 75 NOTRE DAME L. REV. 1133 (2000).

99 John V. Orth, *History and the Eleventh Amendment*, 75 NOTRE DAME L. REV. 1147 (2000).

100 William Marshall & Jason Cowart, *State Immunity, Political Accountability, and Alden v. Maine*, 75 NOTRE DAME L. REV. 1069 (2000).

101 John Nowak, *The Gang of Five & the Second Coming of an Anti-Reconstruction Supreme Court*, 75 NOTRE DAME L. REV. 1091 (2000).

102 Suzanna Sherry, *States Are People Too*, 75 NOTRE DAME L. REV. 1121 (2000).

circumvent prior rulings limiting national power, and its attraction to sovereign immunity as a seemingly more determinate and less result-oriented approach to protecting state autonomy than, for example, the approach of *National League of Cities v. Usery*. Professor Farber offers a somewhat different take, portraying the Court as subscribing to a constitutional faith or credo that includes allegiance to and veneration of state governments and their role in the federal system. For Farber, this somewhat emotional constitutional faith explains why the Court has remained unrepentant in the face of what he clearly regards as cogent scholarly criticism. Professor Nowak offers a less charitable account, characterizing the Court as motivated by hostility to the rights of minorities and by a desire to weaken the national role in the protection of civil rights.

Despite the depth of feeling that underlies these criticisms of the Court's work, for me the singular feature of recent Eleventh Amendment scholarship has been its tendency to justify, rather than to condemn, the Court's expansion of state sovereign immunity. Scholars no longer speak with a single voice in criticizing the Court's immunity doctrine. In addition to the thoughtful contributions of Professors Vázquez, Woolhandler, and Tidmarsh to this Symposium, John Jeffries has written two pieces that offer qualified praise of Eleventh Amendment immunity.¹⁰³ Other symposia include papers that find at least something to like in the recent expansion of state sovereign immunity.¹⁰⁴

All of these defenses of the doctrine of sovereign immunity suggest that the world may have evolved a bit in the thirty years since Professor Scalia taught us the lesson of the Court's imperviousness to the professorial criticism of judge-made immunity law. To be sure, the Justice wrote of federal sovereign immunity, a question that does not present the federalism issues that arise in connection with suits brought against the states. No doubt scholars who defend the Court's decision in *Alden* do so as part of a considered defense of the role of the states in our system of government. But recent scholarship suggests that the academy may have wised up a bit; maybe we've grown tired of being ignored.

103 See Jeffries, *supra* note 9, at 47; Jeffries, *supra* note 45.

104 See Ann Althouse, *The Alden Trilogy: Still Searching for a Way to Enforce Federalism*, 52 RUTGERS L. REV. (forthcoming 2000); Michael Wells, *Suing States for Money: Constitutional Remedies After Alden and Florida Prepaid*, 52 RUTGERS L. REV. (forthcoming 2000).